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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/778,543	02/07/2001	Glenn R. Godley	1033	5035
33055 7590 02/27/2009 PATENT, COPYRIGHT & TRADEMARK LAW GROUP 4199 Kinross Lakes Parkway Suite 275 RICHFIELD, OH 44286				
EXAMINER				
GISHNOCK, NIKOLAI A				
ART UNIT		PAPER NUMBER		
3715				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

Application No.

09/778,543

Applicant(s)

GODLEY, GLENN R.

Examiner

Nikolai A. Gishnock

Art Unit

3715

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 31 December 2007.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1, 2, 4-16, 18 and 19 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 4-16, 18 and 19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 02 May 2007 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

DETAILED ACTION

In reply to applicant's response filed 7/15/2003, claims 3 & 17 are cancelled. Claims 1, 2, 4-16, 18, & 19 are pending.

*Continued Examination Under 37 CFR 1.114*

1. In view of the Appeal Brief filed on 12/31/2007, PROSECUTION IS HEREBY REOPENED. A new ground of rejection is set forth below.

To avoid abandonment of the application, appellant must exercise one of the following two options:

(1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,

(2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth in 37 CFR 41.20 have been increased since they were previously paid, then appellant must pay the difference between the increased fees and the amount previously paid.

A Supervisory Patent Examiner (SPE) has approved of reopening prosecution by signing below:

/XUAN M. THAI/

Supervisory Patent Examiner, Art Unit 3715.

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 1, 2, 4, 5, 9, 11, 12, 18, & 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Hicks (US 3,847,120 A), hereinafter known as Hicks.

4. Hicks discloses an apparatus to teach a subject to vocally emulate sounds (a device for training birds to talk that includes a recording playback unit that repeats spoken sounds, 1:49-51) comprising: a housing comprising an front portion and a back portion (The device includes a suitable housing having a front side panel .... and mounted for pivotal movement adjacent the rear of the device on the extensions, 2:53-3:14, see also Figure 1, Items 11, 12, & 16); a presence detecting sensor located at said front portion for detecting the presence of said subject (One side of the perch is operative to cooperate with a microswitch positioned along the bottom of the device. A lever projecting from the microswitch forms the interconnecting means of the two parts. As will thus be clear, when a bird flies up and alights on the perch, said perch is depressed and the lever is pivoted in the downward direction, 2:62-3:14); a system for playing back a predetermined message, located at said back portion (switching action in the switch activates the tape playback unit and causes sounds to emanate from a speaker positioned directly behind the front panel, 2:62-3:14; also, there is shown a view of the device with the front panel removed, so as to reveal tape playback unit, 3:28-36; the rear portion is understood to be directly behind the front portion), and wherein said system initiates playback of said predetermined message upon detection of the presence of said subject by said presence detecting sensor (the lever controls the switch, and thus starts and stops the tape playback unit. The lever is pivoted upwardly by a spring which thus in turn supports the weight of the perch.

The spring is calibrated so that the weight of the bird on the perch moves the lever so as to switch the switch from the "off" position to the "on" position, 3:67-4:5); a mirror affixed to said front portion (housing having a front side panel having full-size mirror that may be removable, 2:53-61); and a perch assembly coupled to a lower portion of said housing (a perch that is generally U-shaped and mounted for pivotal movement adjacent the rear of the device on the extensions, 2:62-3:14; as in Figure 1, Items 15 & 16, the perch extensions are understood to be on the lower portion of the housing) [Claims 1 & 19].

5. Hicks discloses a method of teaching a subject to vocalize sounds (an improved bird training device has been disclosed that is highly efficient in teaching a bird to talk, 4:35-38) comprising: selecting a prerecorded sound to be played back by a playback system (front side panel is removable to expose the inside components [including the playback system] for changing of the record, 2:53-61); detecting said subject's presence by a presence detecting sensor (2:62-3:14); and upon the sensor's detection of said subject, the prerecorded sound is played back for said subject to hear (3:67-4:5), whereby said subject learns to vocally emulate a desired sound (when the spoken words are reproduced through the playback unit, the bird is likely to mimic the bird of the reflection and begin to repeat the phrases recorded on the record means, 2:5-8) [Claim 18].

6. Hicks discloses recording sounds that are audible to animals (2:5-8; a bird is understood to be an animal) [Claim 4].

7. Hicks discloses wherein said presence detecting sensor comprises a movement sensing device (perch is mounted for pivotal movement, 2:62-3:14) [Claim 5].

8. Hicks discloses a bird perch, said bird perch for holding said subject, said subject being a bird (a bird is encouraged to sit on the perch, 1:63-2:8) [Claim 9].

9. Hicks discloses a mirror (2:53-61) [Claim 11], contained within said housing (2:53-61), said mirror providing visual stimulation to said subject (When the bird sees his full reflection in the mirror, [his] excitement encourages the bird to perform, 1:63-2:8) [Claim 12].

10. Claims 1, 4, 5, 8, & 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Yu (US 5,726,629 A), hereinafter known as Yu.

11. Yu discloses an apparatus (the limitation, "to teach a subject to vocally emulate sounds" is merely an intended use of the apparatus, stated in the claim preamble, and thus no given patentable weight herein; see MPEP 2111.02.II) comprising: a presence detecting sensor for detecting the presence of a subject (motion detector; When a person or an object such as a motor vehicle enters into an area monitored by the motion detector, the invisible infrared heat radiation emitted by the moving person or object is detected by the infrared sensor of the motion detector, 1:37-44); a system for playing back a predetermined message (announcement device, 1:37-44), wherein said system initiates playback of said predetermined message upon detection of the presence of said subject by said presence detecting sensor (1:37-44); and a housing which contains said sensor and said playback initiation system (The lighting fixture comprising an illumination device such as a light bulb, a motion detector, and an announcement device are assembled together within the body of the lighting fixture and formed integral pans [sic] of the lighting fixture, 2:6-25) [Claim 1].

12. Yu discloses recording sounds that are audible to animals (the announcement device is a sound recording and playback device similar to the one used in a telephone answering machine; the announcement can be prerecorded messages by manufacturer such as a dog's barking to scare away stranger, a verbal warning to outside intruder, a short tune of music, a welcome greeting to visitor or guest etc. If a user requires a personalized announcement or message, he or she can record his or her own announcement in the announcement device, all

at 2:48-60; the announcement is audible to humans, who are organisms of the kingdom *Animalia*) [Claim 4].

13. Yu discloses wherein said presence detecting sensor comprises a movement sensing device (a motion detector, 1:37-44) [Claim 5].

14. Yu discloses wherein said presence detecting sensor for detecting the presence of said subject comprises a heat sensing device (the invisible infrared heat radiation emitted by the moving person or object is detected by the infrared sensor of the motion detector, 2:6-25) [Claim 8].

*Claim Rejections - 35 USC § 103*

15. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

16. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

17. Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hicks, in view of Lynch (US 5,568,792 A), hereinafter known as Lynch.

18. Hicks teaches a system for selecting a prerecorded sound to be played (by changing the record, 2:53-61). What Hicks fails to teach is wherein said system comprises a selector switch

for choosing a desired prerecorded sound [Claim 2]. However, Lynch teaches a training device for teaching a bird to recite words, sounds or music, having a digital recording and playback device for recording and playing a desired message (Abstract). Lynch further teaches using a test/record switch located on the face of the enclosure to select a message for recording (5:12-29). Because the switch enables the recording mode of the device, it is understood to be a selector switch. A switch such as this would merely be included in the device of Hicks for enabling recording of the magnetic tape, such that a user may selectively determine what message to teach to a bird. Therefore, it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have used the selector switch taught by Lynch to select a recording to be played to a bird in the device of Hicks, in order to adjust the message to be played if a pronunciation error or other undesirable sound occurred at the time of recording [Claim 2].

19. Claims 6-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hicks, in view of Yu.

20. Hicks teaches all the features of claim 1 as demonstrated above, including a presence detecting sensor for detecting the presence of said subject (2:62-3:14).

21. Hicks discloses wherein said presence detecting sensor comprises a light sensing device [Claim 6] or a laser and a laser detection sensor [Claim 7] for detecting the absence of light due to the presence of said subject. However, Yu discloses wherein said presence detecting sensor for detecting the presence of said subject comprises a heat sensing device motion detector (1:37-44) [Claim 8]. Applicant has further not disclosed that using a light sensor or a laser sensor solves any new stated problem or is for any unexpected particular purpose, over a mechanical sensor, a light sensor, a laser sensor, or a thermal sensor. Moreover, it



appears that the motion detector of Yu, the mechanical level of Hicks, or the Applicant's instant invention would perform equally well for detecting the presence of a subject, such that an output requiring close proximity may be employed. It is further disclosed in applicant's specification that having the sensor be a particular type of presence detector is, in fact, optional design choice (see specification, page 4, lines 12-20). Accordingly, it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have modified the bird feeder of Hicks to use a non-mechanical sensor, as taught in Yu, in order to monitor an area in proximity to the device; also, to implement the sensor as either a light, laser, or thermal sensor, because such a modification would have been considered a mere design choice, which fails to patentably distinguish over Hicks and Yu [Claims 6 & 7].

22. Claims 10 & 13-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hicks, in view of Green (US 6,354,244 A), hereinafter known as Green.

23. Hicks teaches all the features of claims 1 & 9 as demonstrated above, including a bird perch (1:63-2:8). What Hicks fails to teach is wherein said bird perch is detachable [Claim 10] and a trough, inserted within a space formed within said bird perch [Claim 16]. However, Green pertains to garden accessory systems, specifically, planters, birdfeeders, birdhouses, bird perches, and other objects that may be hung or fixed in outdoor locations (1:17-22). Green teaches the design of bird feeder accessories (generally at 10:40-17:58), including single- and double-hopper feeders (10:47-56; see also Figures 13A & B; bird feeders are known to have a trough inserted therein, for dispensing different bird's feed). Green further explains (11:61-67) that both feeders have removable perches, for preventing larger birds from dominating the feed tray. Any bird feeder accessories, such as those taught by Green, would have been obvious upgrades to the bird training device of Hicks; indeed, both Green's bird feeders and Hick's bird

trainer are intended to attract particular *genera* of birds. Therefore, it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have added well-known accessories for bird feeders, such as the hoppers or detachable perch taught by Green, in the bird trainer of Hicks, in order to attract mimicking birds only [Claims 10 & 16].

24. What Hicks further fails to explicitly teach is a means for attaching said apparatus to a birdcage [Claim 13], comprising a bracket [Claim 14], or wherein said apparatus is capable of freely standing [Claim 15]. However, Green also teaches attaching a birdbath to a free-standing pole using brackets as a mounting assembly (Figure 1B, Item 24; 15:53-16:4; also, Figures 23A-C). It is further disclosed in applicant's specification that having the device mounted vs. free standing is, in fact, optional design choice (see specification, page, 7 line 21 through page 8, line 2; also, page 5, lines 14-16). The bird trainer of Hicks would obviously be either mounted to an outdoor fixture or pole, using brackets as taught by Green, or be free standing, as would be used indoors, for training pet birds, where indoor furniture makes such mounting unnecessary. Therefore, it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have mounted the bird trainer of Hicks using brackets, or have left it free-standing, as taught in Green, in order to impart flexibility of indoor or outdoor use to the device [Claims 13-15].

#### *Response to Arguments*

25. Applicant's arguments filed in the appeal brief of 12/31/2007 have been fully considered but they are not persuasive.

26. With regard to appellant's arguments that the mechanical lever in the Hicks reference is not a sensor, according to Webster's New Riverside Dictionary, a sensor is a device that detects and responds to a signal or stimulus. By this definition, the mechanical lever that a bird sits

upon, when then depresses a switch to close a contact and initiate a playback device, does constitute a sensor. As such, the Hicks reference does disclose a sensor, of a mechanical type, sensitive to a bird's weight, and therefore does disclose this element. Appellant also presents the argument that Hicks does not anticipate the initiation of the system for playback when the detachable bird perch is removed. This argument is unpersuasive because applicant's claims do not claim that the system must allow initiation and operation while the bird perch is detached from the system. The combination of claims 1, 9 and 10 at most presumes an operational playback device with a presence detecting bird perch, wherein said bird perch is detachable. The combination set forth in said claims is anticipated by Hicks.

27. With regard to appellant's argument that the motion detector disclosed by Yu is not a presence sensor, examiner's position is that Yu's motion detector is a movement sensing device within the specific scope of Claim 5. Thus, Yu's motion detector anticipates the claims because the claims equate a movement sensing device, such as Yu's, with a presence sensor. Appellant presents the argument that a presence detector is distinct from a motion detector and that the prior art would not detect presence from a motion detector. However, in the instant case there is no functional difference between a motion detector and a presence detector. The training device is stationary, thus there is no means for a bird to find itself upon the perch except through flying through the field of motion detection to land upon the perch set in the front of the device. The motion detection field is easily tuned to extend an active radius no further out than the bird perch, thus detecting the presence of the bird. Functionally, this is the same performance required of the presence detector in this invention and Yu does anticipate the invention.

28. With regard to appellant's argument that Hicks fails to teach any of a light-sensing device, a laser and laser-detection sensor, or a heat-sensing device, and thus has not meet the burden of evidence, examiner notes that Yu teaches a presence detector, such as a motion

detector, for transmitting an electronic signal when a person or an object such as a motor vehicle enters into an area and is detected, which causes the lighting fixture to turn on and at the same time causes playback of an announcement (Column 1, Lines 37-42). Examiner recognizes that obviousness can be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). Additionally, the Supreme Court has particularly emphasized "the need for caution in granting a patent based on the combination of elements found in the prior art," where, "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results," *KSR International Co. v. Teleflex Inc. (KSR)*, 550 U.S. \_\_\_, 82 USPQ2d at 1385 (2007). The focus when making a determination of obviousness is on what a person of ordinary skill in the pertinent art would have known at the time of the invention, and on what such a person would have been reasonably expected to have been able to do in view of that knowledge. This is so regardless of whether the source of that knowledge and ability was documentary prior art, general knowledge in the art, or common sense. See MPEP 2142 (Rev. 6, Sept. 2007). In this case, Yu's motion detector is evidence of a prima facie argument that it was old and well-known at the time of invention that a motion detector may be used for detecting the presence of a person or other object, in order to shine a lamp and play an announcement when the person or object approaches within sight or hearing range. Examiner's position is further that other old and well-known presence sensors, light-sensing devices (e.g., photo-electric eyes), laser-detection sensors (e.g., LIDAR, laser range finders), or heat-sensing devices (e.g., infrared cameras), would merely be substituted for the motion detector in Yu in

order to perform their well established function of triggering a switch when a given sensor-specific threshold is reached, caused by the proximity of a person or object; thus simply substituting one known presence sensor for another in Yu's invention, to obtain predictable results. Thus, examiner's position is that mere substitution of any of a light-sensing device, a laser and laser-detection sensor, or a heat-sensing device for the motion detector of Yu is not patentably distinguishing over the invention of Yu.

29. Applicant's further arguments with respect to the Whitaker and Manico references have been considered but are moot in view of the new ground(s) of rejection.

#### *Conclusion*

30. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Banyas et al. (US 6,119,627 A) discloses a bird feeder having a perch that weights a switch to causes a motor to dislodge a pest, such as a squirrel. Gimbal (US 4,896,305 A) discloses a device for luring wild animals having a microphone, recording, and playback system. Jan '657 (US 5,832,657 A) discloses an ultrasonic device for repelling dogs and cats, incorporating an infrared detector. Jan '630 (US 6,285,630 B1) discloses an automatic bird-expelling device having an audio-data storing device for storing the sound [call] of a fierce bird, such as a hawk or an eagle, or any other audio signals, and a photo-sensing device as a detector. Johnson (US 6,681,714 B1) discloses a method for chasing water fowl from a lake by periodically projecting laser beams across it. Hill (US 3,656,141 A) and Kuebler (US 4,038,639 A) disclose a mechanical lever responsive to the weight of a bird alighting on a large perch and a battery-powered electrical buzzer for an alarm. Marder (US 3,041,911 A) discloses a music box shaped like a birdhouse that is operated when a bird lands on a perch. Metcalf (US 5,257,012 A) discloses a device for repelling birds, operated by a photo-cell movement sensor,

which evaporates a liquid and produces sounds. Novello (US 3,092,076 A) discloses a battery powered bird perch that completes a lamp circuit when a bird alights thereon. Peterson et al. (US 5,450,063 A) discloses a bird aversion system using video cameras, video motion detectors, and radar to detect birds, and combinations of loud speakers, high-intensity lights/strobes and mechanical mannequins in response to detection. Stinson (US 4,878,643 A) discloses a wide-angle mirror to be attached to a birdhouse for chasing away starlings. Tilton (US 4,185,581 A) discloses a weight responsive bird scare perch that sprays fluid.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nikolai A. Gishnock whose telephone number is (571)272-1420. The examiner can normally be reached on M-F 8:30a-5p.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Xuan M. Thai can be reached on 571-272-7147. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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/XUAN M. THAI/

Supervisory Patent Examiner, Art Unit 3715